IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 125

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

PARTY CAB COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF FACTS.

The petitioner has used the findings of fact of the District Court without any reference to the evidence in the Record for substantiation. The District Court has overlooked the following ten important facts, which, when called to the attention of the Court of Appeals for the Seventh Circuit, resulted in a reversal of the District Court's decision. These ten facts are as follows:

1. Respondent could not control the area of operation (Trans. 10, 24, 25).

2. There was no regulation as to mileage (Trans. 11).

3. Respondent could not require the drivers to accept a call for a taxi (Trans. 11, 25).

4. Drivers were not required to telephone the office or to report their whereabouts (Trans. 13, 14, 25).

5. There was no union or union membership required (Trans. 11).

6. Drivers could not be required to purchase gasoline or oil from plaintiff (Trans. 14, 24).

7. Drivers were not required to wear a uniform (Trans. 9, 26).

8. There was no regulation as to hours or shift when the drivers were to operate their taxis (Trans. 11, 15, 27).

9. Drivers did not and could not be required to account for fares collected or tips or gratuities received (Trans. 13, 26).

10. The driver merely paid a specified sum as rental for a day shift or for a night shift (Trans. 107).

Contested Issues.

The contested issues are:

1. Whether the earnings of the drivers of respondent's taxicabs were "wages."

2. Whether the drivers of respondent's taxicabs were employees.

3. Whether the tax herein involved was indefinite and impossible of ascertainment.

The earnings of the drivers of Plaintiff's taxicabs were not "wages".

The evidence is undisputed that the drivers of the respondent's taxicabs retained the fares collected by them from the passengers (Trans. 107). The evidence is further undisputed that the drivers kept no books or records (Trans. 108). The Social Security Act places a tax upon "wages" only (Title 42 U. S. Code, 1940 ed. Secs. 1001-1107). Treasury Regulation 106, Sections 402.228 (e) and 403.228 expressly exclude from the definition of "wages", "Tips or gratuities paid directly to an employee by the customer of an employer and not accounted for by the employee to the employer." It is therefore clear that if the employer cannot compel the employee to account for monies collected by him and has no way of ascertaining the amount of such fares collected, as is true in the instant case, such monies cannot be construed as "wages". It is difficult to imagine a situation where wages paid by an employer would be in an amount unknown or unascertainable by the employer, as is the situation in the case at bar.

The Court of Appeals for the Seventh Circuit in the opinion of the case at bar appropriately makes the following comments (172 F. (2) 87):

> "Another factor which we think strongly militates against the employer-employee relationship is that the 'wages' which afford the basis for the tax were received from the public and not the plaintiff. And the services performed by the drivers and for which such 'wages' were received were rendered directly to the public. Thus the public received the benefit of their services and compensated them therefor. To us it is an anomaly to reason that the drivers were employed by the plaintiff but that they served and received their entire compensation from the public. To hold that the drivers were employees under such circumstances does not, in our view, meet the intent and purpose that the usual common law rule shall be 'realistically applied' ".
>
> * * *

"Treasury Regulation 91 promulgated under Title VIII of the Social Security Act excludes from the computation of wages 'tips or gratuities paid directly to an employee by a customer of an employer, and not in any way accounted for by the employee to the employer'. In the instant situation, neither the charges made by the drivers nor the tips or gratuities received are accounted for to the plaintiff; in fact, the plaintiff is not and has no reason to be any more interested in one than in the other.

"The incongruous situation which the Board's reasoning leads to is highlighted by assuming that a driver charges and receives from his passenger $1.00 for a ride and at the same time receives a tip of 25c. The plaintiff under the regulation need not concern itself with the amount received as a tip but in some unexplainable and mysterious manner must learn of and account for the $1.00 which the driver has received as compensation from his passenger. So far as we are able to discern, there is no more logic or reason for requiring the plaintiff to account for and pay a tax upon one item of receipt by the driver than the other."

The drivers of Respondent's taxicabs were lessees or bailees, not employees.

The evidence is undisputed that the Respondent's taxicabs were operated by drivers engaged by the Respondent under an oral agreement between the Respondent and the drivers. Under the agreement, which exists only from day to day, a driver was assigned a particular taxicab to drive during a single day or night shift, which shift began and ended at the time determined and fixed by the Respondent (Trans. 106). When the driver took a taxicab from the Respondent's garage at the beginning of the shift, he first ascertained whether the gas tank was filled and whether it was in need of oil. If the taxicab needed oil or gas, the driver filled the tank with gasoline and put in the necessary

oil at his own expense from the supply of gasoline and oil fnrnished by the Respondent. The drivers were not required to secure the gasoline and oil from the Respondent, but did so as a matter of convenience (Trans. 106-107). The drivers obtained taxicab business by cruising on the streets or from telephone calls received through the Respondent's office and telephone operators (Trans. 107). The operation of taxicabs for hire in cities is such that the driver must be permitted a large amount of discretion and latitude in obtaining business and in the driving of the taxicab (Trans. 108).

Treasury Regulation 90, which is set forth in the Appendix, under the title "Employed individuals", provides:

> "In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee."

Treasury Regulation 91, which is set forth in the Appendix, under title "Who are employees", likewise provides:

> "In general, if an individual who is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee."

It is certainly clear that in the case at bar the drivers of the Respondent's cabs were not subject to the Respondent's control as to the means or method of accomplishing the result. This, coupled with the fact that the drivers paid to the Respondent a specified sum for the use of the taxicabs and that all fares obtained by the drivers from passengers were kept by the drivers, and the amount which they

received was not accounted for nor was it accountable to the Respondent, certainly makes out a case of independent contractor, not employee. It is quite clear that the drivers used the taxicabs as lessees or bailees of the Respondent. The relationship cannot be explained on any other basis.

The tax herein involved was indefinite and impossible of ascertainment.

The evidence is undisputed that the drivers of the Respondent's taxicab retained the fares collected by them from the passengers (Trans. 107), and that the drivers kept no books or records (Trans. 108). It is to be noted with care that the tax return upon which the Respondent in the case at bar was taxed was not made out by the Respondent or any one of its agents, but was made out by a deputy collector of the Internal Revenue Office. (Their return was one of the exhibits in the case, but was not printed under a stipulation that "the parties hereto may use any part of the original record and refer to the same in their briefs, whether it appears in the printed record or not." (Trans. 118). What basis the deputy collector used is unascertainable from anything that appears in the record before this court. He apparently picked a figure at random without any logical basis for it. It was apparently the deputy's guess and no explanation can be given therefor. Thus, there is no basis in the record for sustaining a tax in the amount of $2,217.26 or any other amount.

The Petitioner will, no doubt, contend that once a tax assessment is made, the taxpayer has the burden of proving its unreasonableness. We respectfully submit that the undisputed facts in the case at bar show that the assessment was made arbitrarily, capriciously and without any factual basis therefor.

The decisions of the United States Courts of Appeals of all the Circuits are uniform.

The petitioner attempts to lead this Honorable Court to beileve that there is a conflict in the decisions of the United States Courts of Appeals on the subject at hand, and petitioner apparently hopes to have the petition for writ of certiorari allowed on that basis. The petitioner relies primarily on the case of *Jones* v. *Goodson*, 121 Fed. (2nd) 176 (decided by the 10th Cir. in 1941). An examination shows that in *Woods* v. *Nicholas*, 163 Fed. (2nd) 615 (1947) the Court of Appeals for the 10th Circuit, the same court which decided the *Jones* v. *Goodson* case, distinguished the holding in the *Jones* case from facts almost identical with the facts at bar. The decisions of the United States Courts of Appeals in the cases involving the relationship of taxi-owner and taxi driver in connection with Social Security tax (with facts similar to the case at bar) are all in accord. This can be seen by an examination of the decisions in the following complete list of Courts of Appeals cases on the subject, in each of which it was held that the taxi-driver was *not* an employee:

1944—*Magruder* v. *Yellow Cab Co.*, 141 Fed. (2nd) 324 (4th Cir.).

1946—*U. S.* v. *Davis*, 154 Fed. (2nd) 314 (App. D. C.).

1947—*Woods* v. *Nicholas*, 163 Fed. (2nd) 615 (10th Cir.).

1949—*Party Cab Company* v. *United States*, 172 Fed. (2nd) 87 (7th Cir.).

1949—*New Deal Co.* v. *Fahs*, (5th Cir.,) decided May 3, 1949.

1949—*Economy Cab Company of Jacksonville*, and *Thrift Cabs, Inc.* v. *Fahs*, (5th Cir.,) decided May 3, 1949.

A situation almost identical with the case at bar was before the Court of Appeals in *Magruder* v. *Yellow Cab Company*, 141 Fed. (2d) 324, (4th Cir. 1944) wherein the Court said:

> "It is crystal clear that two essential conditions precedent must concur in order that a valid tax may be here levied: (1) There must exist a relationship of employer and employee; (2) wages must be paid by the employer to the employee . . . We proceed to a brief consideration of the two problems: (1) The relationship; (2) wages.
>
> (1) *The Relationship.*
>
> "The conclusion of the District Court that the relationship between the taxpayer and the drivers was that of lessor and lessee, and not that of employer and employee, rests upon a narrow technical analysis, and particularly the taxpayer's claimed want of control over the drivers." So we are told in the brief of the Collector. We cannot agree.
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> The applicable Treasury Regulations 106, Section 402.204, does set out as the proper criterion: "control of the employer not only as to what shall be done (by the employees) but how it shall be done." It is perfectly clear here, we think, that any such measure of control, as Judge Chesnut demonstrated, simply did not exist. It is easy to distinguish the case of *Jones* v. *Goodson*, 10 Cir., 121 F. 2d 176 (on which the Collector here relies) by comparing the elaborate elements of control set out in Judge Bratton's opinion (121 F. 2d at page 180) with Judge Chesnut's opinion in the instant case.
>
> The contract which forms the basis here for the relationship between Yellow Cab and the drivers is quite clear and utterly lacking in ambiguity. This contract is in form a lease, it is called a lease, it contains the provisions normally found in a lease. The drivers acquire from Yellow Cab the possession and beneficial use of the taxicabs; Yellow Cab receives from the driv-

ers a stipulated sum of money as rent paid for such use. We see in this contract the hired use of a thing, the classical bailment known as location rei, only that and nothing more.

And there is nothing here to indicate that this contract is a sham to cloak the real relationship. This form of contract was prompted by economic necessity when taxicabs in the District of Columbia shifted from the meter system to the zone system. Hardly could the contract be called a colorable device to escape the instant tax; for the contract was made before the passage of the statute which imposed the tax.

It may well be that Yellow Cab is legally liable to passengers injured through the negligence of the drivers. If so (and we express no opinion on this question) this liability would be predicated upon the doctrine of estoppel, or a holding out to the public . . . In any event, these considerations are in no way determinative of the actual relationship between Yellow Cab and its drivers; for the nature of that relationship stems from the contract between the parties.

(2) *Wages.*

We think too, that Judge Chesnut was eminently correct in his finding of fact: 'Plaintiff (Yellow Cab) paid no money to the drivers for wages or otherwise.' Yellow Cab paid nothing to the drivers, that is conceded. The only money passing between Yellow Cab and the drivers was paid by the drivers to Yellow Cab as rent for the taxicabs. We are asked to hold, though, that the fares received by the drivers from passengers constitute wages paid by Yellow Cab to the drivers. Our imaginations are not quite so lively. It is true that the term "wages" is given a broad meaning by the Regulations, but we might point out that Social Security Tax Regulations 106, Sections 402.228 (e) and 403.-228 expressly exclude from the denotation of wages: "Tips or gratuities paid directly to an employee by a customer of an employer and not accounted for by the employee to the employer". In the instant case,

Yellow Cab had no title or interest in, no power to make the drivers account for, the money received by the drivers from passengers. Yellow Cab was entitled to receive, and did receive, only the rent paid by the drivers."

In *United States* v. *Davis*, 154 Fed. (2d) 314, (App. D. C., (1946) the Court of Appeals for the District of Columbia, said:

"The question before us, as it related to the operation of taxicabs in the District of Columbia by the Yellow Cab Company, was considered by the District Court for the District of Maryland and by the Circuit Court of Appeals for the Fourth Circuit in *Yellow Cab Co.* v. *Magruder*, D. C., 1943, 49 F. Supp. 605, and *Magruder* v. *Yellow Cab Co.* of D. C., 1944, 141 F. 2d 324, 152 A. L. R. 516. The operations in that case were substantially identical to those in the present case, except that there the company was the owner. The opinion of the District Court, by Judge Chesnut, reflected an exhaustive consideration of the problem, and his views were adopted by the Circuit Court of Appeals, in an opinion by Judge Dobie. We agree with the views expressed in those two opinions. It is unnecessary to repeat the considerations which led those courts, and lead this court to conclude that the driver of a taxicab, under the circumstances stated, is not an employee of the owner of the cab within the meaning of the statutes under which these taxes were collected.

Appellant relies, principally, upon *Jones* v. *Goodson*, 10 Cir., 1941, 121 F. 2d 76, in which the Circuit Court of Appeals for the Tenth Circuit, considering the operation of taxicabs by the Y & Y Operating Company in Oklahoma City, held that the drivers were employees of the Company. We think, as both courts thought in the *Yellow Cab Company* case, *supra*, that the facts in that case distinguish it. In the *Jones* case, the court found that the drivers were members of a local union which had a master contract with the Com-

pany which provided among other things, that the union should furnish the Company competent drivers, specified maximum rentals, maximum mileage per shift, and provided that the Company might, at its option, operate the cabs on a percentage basis. It found that the Company and the drivers had no other contract. The court found that the Company had, and exercised, the right to say whether the drivers should work on a day or night shift; to require that drivers purchase all their gasoline from the Company; to require that drivers operate only within the city limits; to require that they telephone the main office hourly, giving their whereabouts; and that it had the right to discharge for violation of these requirements. The court held that these rights of the Company were substantial and that they related to the method and means of performing the service. This brief recitation of the key facts in that case is sufficient to demonstrate the wide difference between it and the case at bar."

Cases Distinguished.

In the case at bar, the trial court filed a memorandum which appears at pages 96-104 of the Transcript of Record. This same memorandum is published in 75 Fed. Supp. 307-311. The trial judge, according to this memorandum, relied upon the following reported cases: *Jones* v. *Goodson*, 121 Fed. (2) 176 (10th Circuit), and *United States* v. *Silk* and *Harrison* v. *Greyvan Lines, Inc.*, 331 U. S. 704. An examination of these cases shows that they are factually distinguishable from the case at bar. In fact, in *Woods* v. *Nicholas*, 163 Fed. (2) 615 (1947), the Court of Appeals for the 10th Circuit, which decided the *Jones* v. *Goodson* case, distinguished the cases cited in the memorandum of the trial judge from facts almost identical with the facts in the case at bar. In view of this, we quote from same at length. The Court of Appeals in the *Woods* case said:

"Forrest M. Woods, hereinafter referred to as the taxpayer, instituted this action against Ralph Nicholas, Collector of Internal Revenue for the District of Colorado, hereinafter referred to as the collector, to recover social security taxes paid under protest for the years 1941 and 1943 pursuant to section 901, Title IX of the Social Security Act, 49 Stat. 639, section 1600 of the Internal Revenue Code, 26 U. S. C. A. Int. Rev. Code S 1600.

These facts were established on the trial. For some time prior to 1933, the taxpayer owned and operated the Zone Cab Company in the City of Denver. In 1932, the city passed an ordinance which provided among other things that thereafter licenses to operate taxicabs should issue only to those engaged in the operation of cabs under the municipal code on April 15, 1932. The effect of the ordinance was to grant to those operating cabs on that date a limited franchise to continue in the business, and to exclude others. In 1933, the taxpayer sold all of his cabs but retained the right to the license; and he owned a certificate of convenience and necessity issued by the Public Utilities Commission of Colorado authorizing the operation of cabs within a prescribed radius outside the City of Denver. The business continued under the name of Zone Cab Company, but other individuals owned the cabs operated on the line, all of which were painted alike and bore the name Zone Cab Company. In order to comply with the requirements of the city, the legal title to the several cabs was carried in the name of the taxpayer, and the necessary certificates and other documents, relating to the titles were deposited with the Manager of Safety of the city, but he was not the equitable owner of the cabs. He obtained license plates for the cabs, but the equitable owners reimbursed him at least in part for the cost. He carried public liability insurance on all cabs operated in the name of the company, but the equitable owners made reimbursement for the outlay. And he handled all of the

advertising connected with the business. He determined in the first instance whether a particular vehicle should become a member of the fleet of cabs. Sometimes cabs on the line changed hands, passing from one owner to another, and in such event, his records were changed and he took steps to have the records of the city changed accordingly. He maintained a garage at which the cabs were serviced, maintained a switchboard through which calls for cabs were passed, and maintained several call stations at different places in the city. He kept on hand a supply of gasoline, and the drivers of all cabs operated on the line were required to buy their gasoline from him. He employed a manager, a bookkeeper, a mechanic, and three telephone operators who also served as dispatchers. The owners and drivers of the taxicabs reimbursed him for a small part of the rent on the garage and of the salaries of the telephone operators. The manager assisted in the supervision of the garage and the equipment of the taxpayer, and he sometimes dealt with complaints of patrons. The owners of the cabs furnished one mechanic. Some of the owners drove their own cabs, for one shift; and in each such instance, the owner had another driver operate the cab on the opposite shift. In some instances, an owner owned more than one cab; and in some, the driver did not own a cab. The owners and drivers held meetings from time to time to formulate policies and to promulgate rules and regulations for drivers. The taxpayer and his manager attended some of the meetings and sometimes participated in them to the extent of making suggestions. At such meetings, a day boss and a night boss were selected from the drivers who acted as foremen during their regular shift as drivers, but they served without pay. As such foremen, they employed, disciplined, suspended, and discharged drivers; and posted rules and regulations promulgated by the owners. Whether a driver worked on the day shift or the night shift was determined by agreement of the owners and drivers. The owner of a cab could object to a par-

ticular driver operating his cab, and in that event the foreman on that shift placed the name of the driver at the foot of the extra board. The taxpayer was paid a fixed fee for the privilege of operating the cabs under his license and certificate of convenience and necessity. The fee was $3.30 per day for each cab. At the end of a shift, the driver of the cab turned into the taxpayer a worksheet, and paid to him the amount of the fixed fee and the amount due for gasoline. The driver also turned into him an amount representing the contribution of the driver to the crash fund and the sick fund maintained by the owners and drivers for their own benefit, the amount due by the driver to the salary of the dispatchers, and the amount due on rent on the garage. And if the driver did not own the taxicab, he also paid to the taxpayer the amount of a fixed fee due the owner of the cab for its use. These payments were made without reference to the amount the driver had collected from patrons during the shift. The driver kept and retained as his compensation all amounts collected from patrons over and above that paid to the taxpayer, and no accounting was made to the taxpayer of the excess. The taxpayer received the funds paid to him and made disbursement accordingly. While the taxpayer was at the place of business almost every day, ordinarily he remained there only for about an hour. The manager was there more than that, but he too was absent a large part of the time.

Entertaining the view that the individuals driving the taxicabs operated under the name of Zone Cab Company were employees of the taxpayer within the scope and meaning of the Social Security Act, and that the taxpayer was liable for the excise tax upon the remuneration earned by the drivers, the court entered judgment for the collector, and the taxpayer appealed.

* * *

Coming to the merits, section 1600 of the Internal Revenue Code, supra, lays an excise tax upon every employer, as defined in section 1607 (a), equal to three

per cent of the total wages, as defined in section 1607 (b), paid by him during the calendar year with respect to employment, as defined in section 1607 (c). Section 1607 (a) defines the term "employer" to mean a person having eight or more individuals in his employment for the time therein specified. With certain exceptions not having any material bearing here, section 1607 (b) defines the term "wages" to mean all remuneration for employment including the cash value of all remuneration paid in any medium other than cash. Section 1607 (c) provides in material part that the term "employment" means any service of whatever nature performed by an employee for the person employing him. And Treasury Regulation 107, promulgated under the statute provides in substance that generally the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the result to be accomplished and the details and means by which the result is accomplished; that it is not necessary that the employer actually direct and control the manner in which the services are performed; that it is sufficient if he has the right to do so; that the right of discharge is an important factor; that another factor characteristic of an employer, but not necessarily present in every case, is the furnishing to the person performing the services of tools and a place to work; that, in general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods of accomplishing the result, he is an independent contractor; and that an individual performing services as an independent contractor is not as to such services an employee.

The Social Security Act fails to contain a definition to which a court may turn in a case of this kind for a ready rule of thumb in determining whether the relationship of employer and employee exists, within the scope of the Act. But the Act should not be given a

narrow, constricted interpretation with respect to its coverage, as an interpretation of that kind would fail to comport with the Congressional policy and purposes embedded in the Act. *United States* v. *Silk*, 67 S. Ct., 1463; *Glenn* v. *Beard*, 6 Cir., 141 F. 2d 376, certiorari denied, 323 U. S. 724, 65 S. Ct. 57, 89 L. Ed. 582.

While the Act should be construed with the manifest Congressional policy and purposes in mind, all who render service for an industry are not necessarily employees. The employees of a private contractor engaged in the construction of a new plant for an industry at a fixed price or on a cost-plus basis are not employees of the industry. Neither is a distributor engaged in marketing at his own risk the product of another an employee of the producer. And where a separate segment of an integrated industrial enterprise is in the hands of an independent contractor, he is liable for the social security taxes imposed upon the employer insofar as that segment of the business is concerned. *United States* v. *Silk*, *supra*.

The question whether the relationship existing between the parties is that of employer and employee, or employer and independent contractor or agent and independent contractor has presented itself for determination under a wide variety of circumstances. And in determining the question courts have frequently been governed by the common-law rule that the relationship of master and servant exists where the employer has the right to direct and control the method and manner in which the work shall be done and the result to be accomplished, while the relationship of employer and independent contractor obtains where the employee engages to perform the services according to his own method and manner, free from direction and control of the employer in all matters relating to the performance of the work, except as to the result or the product. But the Social Security Act was enacted pursuant to a public policy unknown to the common law, and the question of its applicability in a case of this kind is to be judged with reference to the purposes which Congress had in

mind rather than from the rules of the common law for determining tort liability. In their consideration of the question under the Social Security Act, courts have looked with meticulous care to the constituent elements of each individual case. In *Magruder* v. *Yellow Cab Company*, 4 Cir., 141 F. 2d 324, 152 A. L. R. 516, the company leased and let its taxicabs to drivers for a specified sum per day, or per week. The driver paid rental to the company, operated the cab at his own expense, and was responsible for loss or damage except that caused by collision or other casualty covered by insurance which the company carried. Placing emphasis upon the point that the company made no payment whatever to the drivers, upon the absence of right or interest of the company in the money which the drivers collected from their passengers, and upon the lack of control of the company over the drivers, the court reached the conclusion that the relationship between the company and the drivers was not that of employer and employees, within the meaning of the Act. In *United States* v. *Mutual Trucking Co.*, 6 Cir., 141 F. 2d 655, the company contracted with certain owner-operators of trucks to do hauling for it in interstate commerce. The owner-operators hauled exclusively for the company, ordinarily using their own equipment which consisted of a tractor and trailer. The trucks carried plates for which the company made application to the Interstate Commerce, but each owner-operator secured his own state license plates and driver's license. The equipment was usually marked in a manner indicating that it was operated for the company. The operation consisted of the transfer of sealed and loaded trailers between certain terminals; and the owner-operator was paid a flat rate for each trip, according to the printed schedule. All drivers of trucks were required to register at stations maintained by the company on the principal routes for the purpose of checking the time of the trip; and drivers were also required to file daily logs indicating the number of hours driven. The company maintained a road patrol

consisting of certain inspectors on the routes in order to check on the conduct of the drivers with respect to observing applicable statutes and regulations relating to the operation of trucks of that kind. While observing that both the company and the owner-operators had an interest in the transportation, the court was emphatic in saying that there was no such control on the part of the company as to create the relationship of employer and employee between the company and the owner-operators or the drivers. In *United States* v. *Silk*, *supra*, two sets of truckers were considered, one hauling coal for Silk and the other hauling merchandise for Greyvan Lines, Inc. Silk sold coal at retail. His coalyard consisted of two buildings, one for an office and the other a gathering place for workers. He owned no trucks himself but contracted with workers owning their own trucks to deliver coal at a uniform price per ton. That was paid to the trucker out of the price which Silk received for the coal from the customer. When an order for coal was received in the office, a bell was rung in the building used by the truckers. The truckers had voluntarily adopted a call list upon which their names came up in turn, and the top man on the list had an opportunity to deliver the coal ordered. The truckers were merely given a ticket indicating where the coal was to be delivered and whether the charge was to be collected. They were not instructed as to how their jobs were to be done. They came and went at their convenience, hauled coal for others at their pleasure, paid all expenses of operating the trucks, and furnished extra help when necessary to the delivery of the coal. They were paid after each trip, at the end of the day, or at the end of the week, as they requested, and no record was kept of their time. Greyvan Lines, Inc., operated its trucking business under a permit issued by the Interstate Commerce Commission. In addition to its principal office, it maintained agencies to solicit business in many of the larger cities in the areas served, from which it contracted to move goods. It entered into contracts with truckmen

under which the truckmen hauled exclusively for it, furnished their own trucks and equipment, furnished their own labor, picked up, handled, and delivered shipments, paid all expenses of operation, furnished all fire, theft, and collision insurance which the company might specify, paid for all loss or damage to shipments, collected all monies due the company from shippers or consignees, and turned in such moneys at the office of the company to which they reported after making delivery of a shipment. The truckers personally drove their trucks at all times or were present on the truck when a competent relief driver was driving. The trucks bore the painted designation "Greyvan Lines." The truckmen were required to take a short course of instruction in the company's methods of doing business before carrying out their contractual obligations to haul, and the company furnished to truckmen a manual of instructions which purported to regulate in detail their conduct in the performance of their duties. The company maintained a staff of dispatchers who issued orders for the movement of the truckers, but not the routes to be used. The truckmen reported at intervals to the dispatcher with respect to their positions. All permits, certificates, and franchises necessary for the operation of the trucks were obtained at the expense of the company, and the company carried cargo insurance covering the goods moved. As remuneration, the truckmen received from the company a percentage of the tariff charged, varying between 50 and 52 percent and a bonus up to three per cent for satisfactory performance of the service. Deciding the two cases together, the court stated that the right of the industry to control the method and manner the work shall be done is a factor in determining whether the worker is an employee or an independent contractor, but rejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants," and approved the statement in an earlier case that "the primary consideration in the determination of the applicability of the statutory defi-

nition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the act." The court further said that in determining whether the relationship is that of employer and employee, "courts will find that degree of control, opportunities for profit or loss, investment in facilities, permanency or relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete." Governed by these principles for determining the question, the court held that in each instance the truckers were not employees of the industry, within the coverage of the Act. The later case of *Bartels* v. *Birmingham*, 67 S. Ct. 1547, furnishes helpful guidance and direction, although it did not involve an industry and drivers of taxicabs or drivers of trucks. There operators of public dance halls made arrangements for orchestras to play at their establishments for a contract price. More of the engagements were for one-night stands, though a few were for successive nights. In each instance the orchestra was built around a leader of distinctive style in the presentation and rendition of dance music. He employed musicians, paid their salaries, exercised complete control over the orchestra, and exercised the right of discharge. The operator paid to the leader the agreed price. Any excess was his profit and any deficit his personal loss. Citing *United States* v. *Silk*, *supra*, the court held that for purposes of the statute the relation between the operator and the leader was that of employer and independent contractor, and that the leader rather than the operator was the employer of the musicians.

In *Jones* v. *Goodson*, 10 Cir., 121 F. 2d 176, we held that the relationship between a taxicab company and the drivers of taxicabs was that of employer and employee, within the meaning of the Act. But there the company operated under its name and insignia a large fleet of taxicabs, about half of which it owned. It maintained a central office and garage, two downtown

stations, a telephone exchange at its main office, 20 or 25 call stations at various places throughout the city, and a corps of personnel. It had and exercised the right to say whether a driver should work on the day or night shift; to say which cab he should drive if he operated company-owned cars; to require that the insignia and telephone number of the company be placed on all individually owned and operated cars; to require that drivers purchase all of their gasoline from the company, and, in addition, that drivers of individually owned cars buy all of their oil from it; to require that drivers operate only within the city limits; to require that they telephone the main office hourly giving their whereabouts; to require that they maintain a good record for accidents; to require that they be courteous to patrons; and to require that they be presentable in their personal appearance. And it had the right of discharge for the violation of any of these several requirements or for the violation of any other rule promulgated by the company. The difference between that case and this one is apparent. Here, the taxpayer did not hire the owners or drivers of the taxicabs, and did not have any right of control in respect to the method and manner in which they did their work. He did not have the right to determine whether they should work on the day or night shift, did not have the right to determine which cab or cabs they should drive, and did not have the right to determine the routes over which they should operate. He did not pay them any wages or other like compensation, and he did not have the right to discipline or discharge them. He merely furnished the license and certificate of convenience and necessity, as well as certain facilities, for which he was compensated. His primary compensation was the fixed fee paid him. And he was paid certain additional sums to be applied on the rent and on the salaries of the telephone operators. The owners of the cabs bore their own responsibility with respect to the method and manner of operating the cabs, and the drivers were respon-

sible to them in that respect. In that regard, neither the owners nor the drivers were responsible to the taxpayer.

We think that the relationship existing between the taxpayer and the owners and drivers of the taxicabs was not that of employer and employee, within the scope of the statute, *United States* v. *Silk, supra; Bartles* v. *Birmingham, supra; Magruder* v. *Yellow Cab Company, supra; United States* v. *Mutual Trucking Co., supra.*

The judgment is reversed and the cause remanded with directions to enter judgment for the taxpayer."

Congressional Amendment.

In 1948 the 80th Congress by Public Law 642 amended the Social Security Act by inserting the following definition:

"The term 'employee' includes an officer of a corporation, *but such term does not include* (1) *any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or* (2) *any individual (except an officer of a corporation) who is not an employee under such common-law rules.*" (The amendatory part is set out in italics.)

Public Law 642 also provided that the amendment "shall have the same effect as if included in the Social Security Act on August 14, 1935, the date of its enactment".

This amendment was vetoed by the President with the following comment:

"I return herewith, without my approval, House Joint Resolution 296, to maintain the status quo in respect of certain employment taxes and social-security benefits pending action by Congress on extended social security coverage.

"Despite representations to the contrary, sections 1 and 2 of this resolution would exclude from the cover-

age of the old-age and survivors insurance and unemployment-insurance systems up to 750,000 employees, consisting of a substantial portion of the persons working as commission salesmen, life-insurance salesmen, piece workers, truck drivers, *taxicab drivers*, miners, journeymen tailors, and others. In June 1947, the Supreme Court held that these employees have been justly and legally entitled to social-security protection since the beginning of the program in 1935. I cannot approve legislation which would deprive many hundreds of thousands of employees, as well as their families, of social-security benefits when the need for expanding our social-insurance system is so great." (Congressional Record Vol. 94, Page 8268, (Advance part) June 14, 1948. Italics ours.)

* * *

The President's veto was then overridden as is shown by the following:

"THE SPEAKER . . . The question is, Will the House, on reconsideration, pass the bill, the objections of the President to the contrary notwithstanding?

"MR. GEARHART . . . Some time ago the Supreme Court of the United States rendered two decisions in what are known as the Silk and Gray Van cases, cases which involved the question whether or not certain persons were employees, and therefore covered by social security, or whether they were independent contractors.

"In each of these decisions the correct result was reached by the Supreme Court, applying, as they should, the ancient common-law definition of employment. However, there crept into these decisions a little of what lawyers call obiter dicta; that is, some words which were quite unnecessary to the result. These words were to the effect that, for purposes of social security, the Social Security Administration was not necessarily bound in extending the social-security coverage, by the ancient common-law definition of master and servant, or employer and employee, as you may

choose to call it, but that they could take into the system as employees any persons who were dependent upon a business in the light of economic realities, thereby throwing into the entire system a confusion which required immediate legislative attention.

"The Social Security Administration and the Treasury proceeded immediately to prepare a departmental regulation to carry that obiter dicta definition into effect. If this Congress had not interfered, tens of thousands of people in America who never dreamed they were employed by anybody and never for one moment thought they were covered by social security or subject to payroll taxes would have found that they had been swept into the social-security system by bureaucratic ukase. In other words, they would suddenly have found that they had more employers than a dog had fleas. So, to end this confusion, this Congress acted promptly, and, after thoroughgoing debate, and by vote of nearly 7 to 1, proceeded by legislation to put the matter in order once again by restoring the ancient doctrine of the common law defining the relation of master and servant, employer and employee." (Congressional Record Vol. 94, Pages 8268-8269, (advance part) June 14, 1948)

* * *

"So two-thirds having voted in favor thereof, the bill was passed, the objections of the President to the contrary notwithstanding." (Congressional Record. Vol. 94, Page 8271, (advance part) June 14, 1948)

In *Party Cab Company* v. *United States,* 172 Fed. (2nd) 87, (which is the case at bar), the Court of Appeals for the 7th Circuit pointed out the history of the legislation herein involved and held that no employer-employee relationship existed.

In *New Deal Cab Company* v. *Fahs* (decided May 3, 1949), the Court of Appeals for the 5th Circuit held that no employer-employee relationship existed, and said:

"The late Congress, however, with the purpose expressed in the committee reports to reestablish the common law tests as stated in the Regulation, amended Internal Revenue Code, Secs. 1420 (d) and 1607 (i), 62 Stats., 438, so as to make common law rules applicable in determining the employer-employee relationship and the status of an independent contractor; and the amendments were made retroactive to the date of the original enactment of the sections. Congress thus rebuked the overzeal of the courts in trying to make a better law than the words of Congress had made."

* * *

"Applying the common law rules as commanded by the recent legislation, it cannot be held that these drivers are employees, and that the money they earn is wages. The tax was wrongly collected. A full discussion is found in *Party Cab Co.* v. *United States,* 172 Fed. (2nd) 87.

"The judgment is reversed and the cause remanded with directions to enter a proper judgment for the plaintiff."

The case of *Economy Cab Company of Jacksonville* and *Thrift Cab Co.* v. *Fahs,* (also decided by the Court of Appeals for the 5th Circuit) follows the case of *New Deal Cab Company* v. *Fahs,* and, likewise, holds that the relationship between the taxi-drivers and taxi-owners is not that of employer-employee.

Thus, every Court of Appeals—4th Circuit, 5th Circuit, 7th Circuit, 10th Circuit, and District of Columbia—which had a similar situation before it, dealing wth Social Security tax, has uniformly held that the employer-employee relationship does not exist. *There is no conflict in the decisions of the United States Courts of Appeals and we respectfully submit that the Petition for the Writ of Certiorari be denied.*

Conclusion.

It is clear that the facts in the case at bar do not present an employer-employee relationship under the common-law rule, which must be applied under the 1948 Congressional Amendment.

In the instant case, the Respondent, Party Cab Company, on the undisputed facts did not pay any compensation to the operators. On the contrary, the cab operators of the Respondent company paid a stipulated fixed rental covering the use of the cab for a certain fixed period of time to the Respondent, and it was immaterial to the Respondent as to whether the driver did or did not use the cab during the fixed rental period. The Respondent's revenue could not thereafter be affected in the slightest by the cab operators' activities or labors during said rental period. The drivers of the Respondent company were not and could not be compelled to account for any fares collected by them and, therefore, no "wages" were paid by the Respondent to any of the cab operators. The facts are that:

1. Respondent could not control the area of operation (Trans. 10, 24, 25).
2. There was no regulation as to mileage (Trans. 11).
3. Respondent could not require the drivers to accept a call for a taxi (Trans. 11, 25).
4. Drivers were not required to telephone the office or to report their whereabouts (Trans. 13, 14, 25).
5. There was no union or union membership required (Trans. 11).
6. Drivers could not be required to purchase gasoline or oil from plaintiff (Trans. 14, 24).

7. Drivers were not required to wear a uniform (Trans. 9, 26).

8. There was no regulation as to hours or shift when the drivers were to operate their taxis (Trans. 11, 15, 27).

9. Drivers did not and could not be required to account for fares collected or tips or gratuities received (Trans. 13, 26).

10. The driver merely paid a specified sum as rental for a day shift or for a night shift (Trans. 107).

We respectfully submit that:

1. The earnings of the drivers of Respondent's taxicabs were not "wages".

2. The drivers of Respondent's taxicabs were lessees or bailees, not employees.

3. The tax herein involved was indefinite and impossible of ascertainment.

4. The Courts of Appeal in the United States are all uniform in their decisions on the subject at hand.

WHEREFORE, Respondent respectfully requests that the Petition for the Writ of Certiorari be denied.

Respectfully submitted,

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